COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Harasiuk, 2023 ONCA 594
DATE: 20230911
DOCKET: COA-23-CR-0653

Trotter, Thorburn and Favreau JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Krzysztof Harasiuk

Appellant

Krysztof Harasiuk, appearing in person

Dan Stein, appearing as Duty Counsel

Eunwoo Lee, for the respondent

Heard: September 6, 2023 by video conference

On appeal from the sentence imposed on May 9, 2023 by Justice Allison Dellandrea of the Ontario Court of Justice.

REASONS FOR DECISION

Introduction

[1] This appellant entered guilty pleas to 10 offences. The parties presented the sentencing judge with a joint submission of "time served." The sentencing judge rejected the joint submission and imposed a sentence of 24 months' imprisonment

(less credit for pre-sentence custody and time spent on bail with a house arrest condition). The appellant appeals his sentence.

[2] The appeal is allowed. The sentencing judge should have acceded to the joint submission because it would not bring the administration of justice into disrepute, nor is it contrary to the public interest: *R. v. Anthony-Cook*, 2016 SCC 43, [2016] 2 S.C.R. 204.

Background

[3] Before the appellant was arraigned, counsel advised the sentencing judge that there was a joint submission. At the time, the appellant had been in pre-sentence custody ("PSC") for 204 days. Based on credit at a rate of 1.5:1, it was the equivalent of 10 months' imprisonment.

[4] The sentencing judge conducted a thorough plea comprehension inquiry. The appellant acknowledged that the sentencing judge had the discretion to impose a different sentence than the one jointly proposed by the parties.

[5] The appellant's offences arose from three separate incidents that occurred between 2019 and 2022.

[6] The first incident involved a theft from a department store. The appellant collected $285 worth of clothing and left the store. When he was apprehended by store security, he sprayed both security officers with a substance believed to be pepper spray. As he got into a car, he threatened to come back and kill them.

[7] In the second incident, the appellant was found appearing to be asleep in the driver's seat of a stolen vehicle he had driven into a ditch. The appellant had an imitation firearm (i.e., a pellet gun) on the front passenger seat. Pellets for the gun were also found in the vehicle. The appellant was highly intoxicated from the ingestion of non-prescription drugs. He was bound by a release order not to possess any weapons.

[8] The third incident occurred when the appellant attempted to break into a car parked in a driveway. When he was confronted by the owner's sister, the appellant attacked her with a sharp object (i.e., a small letter-opener). She suffered non-life-threatening injuries.

[9] After accepting the appellant's pleas, the sentencing judge invited defence counsel to make submissions. The appellant was 53 at the time of sentencing. He experienced post-traumatic stress disorder that led to a serious drug addiction, mainly to methamphetamine. The appellant had previously been referred to CAMH. For one reason or another, he did not attend and seek treatment. At the time of sentencing, he expressed a desire to follow through this time.

[10] The appellant was remorseful for his offending. He had the support of two friends whom he had known for many years. He planned to live with them. The appellant also had employment waiting for him upon release.

[11] The appellant has a prior criminal record, dating back to 1992. It contains a number of convictions for assaultive behaviour, in addition to weapons offences and breaches of court orders. When the appellant was sentenced to imprisonment in the past, most of his sentences were relatively brief, ranging from 10 to 70 days. His most serious sentence was 2 ½ years, imposed in 2015, for firearms offences and break and enters. Most of this sentence was absorbed by PSC.

[12] Following defence counsel's submissions, the sentencing judge advised counsel of the following:

> I'm really struggling with the proposed joint recommendation in terms of the adequacy of what's being recommended to address the principles of denunciation and deterrence that I'm compelled to give primacy to in consideration of the sentencing of these 10 very serious offences spread across three years, reflecting a pattern of consistent violence and possession and use of a multitude of weapons including the recurring use of pepper spray, a knife, and possession of an imitation firearm.

The sentencing judge also referenced the appellant's criminal record.

[13] In accordance with *Anthony-Cook*, the sentencing judge adjourned the sentencing hearing in order to give counsel the opportunity to make further submissions in support of the joint submission.

[14] Eight days later, further submissions were made during which defence counsel again emphasized the role that the appellant's drug addiction played in his present and past offending.

[15] The Crown also made forceful submissions in support of the joint submission, reminding the sentencing judge of the high threshold for departing from a joint submission, as discussed in *Anthony-Cook*. He stressed that the appellant's omnibus plea dispensed with the need to conduct three separate trials. The Crown further advised the sentencing judge that the victim's injuries in the third incident were not as serious as they may have seemed at the time of the plea, when it was implied that she had stab or puncture wounds. In fact, the victim suffered an eight centimetre abrasion. The Crown said that this was a factor that was taken into consideration in forming the joint submission.

[16] Sentencing was adjourned for almost three weeks for the purposes of gathering institutional records relating to lockdowns. By the time he was sentenced, the appellant had spent 232 days in PSC. Credited at a rate of 1.5:1, this amounted to 348 days. To this, the sentencing judge gave additional credit of 45 days for institutional lockdowns, and 28 days for time spent on house arrest bail. Thus, when sentence was imposed, the appellant was credited with 421 days, or roughly 14 months.

[17] The appellant was sentenced to 24 months in custody (or 720 days), less 421 days, leaving him with 299 days (roughly 10 months) to serve.

The positions of the parties

[18] Mr. Stein, on behalf of the appellant, submits that the sentencing judge erred in departing from the joint submission by not adhering to the high standard established in *Anthony-Cook*; instead, she essentially assessed the fitness of the proposed sentence, disagreed with it, and imposed the sentence she thought was appropriate. Mr. Stein also submits that the sentencing judge overlooked the debilitating impact of the appellant's addiction to drugs, and the role it played in his offending.

[19] Making submissions on his own behalf, the appellant submits that he should have been given greater credit for the conditions of PSC, and for the time he spent on house arrest bail.

[20] The Crown on appeal takes a different position than the trial Crown. He submits that the sentencing judge made no error in rejecting the joint position.

Discussion

[21] In *Anthony-Cook*, the Supreme Court of Canada emphasized the vital role that joint submissions play in the criminal justice system. In an overburdened system, joint submissions are beneficial to the efficient administration of justice. They also provide the value of a high degree of certainty to the Crown, the accused, and victims. That is why the test for departing from a joint submission is so stringent. In *Anthony-Cook*, the Supreme Court held that a sentencing judge

must not reject a joint submission merely because they believe it to be unfit, or even demonstrably unfit. Moldaver J. wrote, at para. 32: “a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest.” He further explained, at para. 34:

> Rejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down.

[22] In *R. v. Fuller*, 2020 ONCA 115, this court emphasized that joint submissions should only be rejected in “rare cases”: para. 16. As the court said, at para. 16: “The effective and efficient operation of our criminal justice system relies on litigants enjoying a high degree of confidence that joint submissions will be accepted when guilty pleas are entered.”

[23] The sentencing judge was familiar with this test, which she referred to in her detailed Reasons for Sentence. She also acknowledged the new information concerning the victim’s injuries during the third set of offences. Nonetheless, she held that the joint submission did not respect the principles of sentencing, including proportionality, totality, denunciation and deterrence, and separation of offenders from society. She said:

> In my view, the sentence advanced in this case would bring the administration of justice into disrepute and be contrary to the public interest. I make this determination based on my assessment of the multitude of aggravating factors applicable in this case, some of which I articulated specifically in my concerns expressed to counsel during their submissions. By this, I'm referring to the use of some form of weapon, be it pepper spray, and imitation firearm, or the letter opener or item initially described as a knife in respect of the third incident.

[24] Mr. Stein submits that, when read as a whole, the sentencing judge's reasons reflect the application of a fitness test. We respectfully agree. In *Fuller*, tracking the language in *Anthony-Cook*, the court said that the sentencing judge should have addressed why the proposed resolution was so unhinged from the reality of the situation that it would have caused a "reasonable person…to believe that the proper functioning of the justice system had broken down" (para. 22).

[25] Although the joint submission may have been lenient, perhaps even very lenient, this was not a permissible basis for rejecting it. The cluster of offences committed by the appellant was varied and unique; it did not fit easily within an established range of sentence. In the circumstances, the joint submission would not lead a reasonable and informed person to fear that the justice system had broken down in this case.

[26] As the trial Crown pointed out when called upon to justify the joint submission, the appellant's omnibus plea spared the system the resources that would have been required to conduct three separate trials. Respectfully, this ought

to have been a significant factor in considering the impact of acceding to the joint submission on the administration of justice.

[27] Moreover, the landscape subtly shifted as the sentencing proceedings continued. Almost a month passed between the plea and the imposition of sentence; in the meantime, more PSC accrued. Also, the joint submission had been rejected before the calculation of additional credit for institutional lockdowns, triple bunking, and time spent on house arrest bail. What started as an effective sentence of 10-months' imprisonment had grown to 14 months. The sentencing judge did not re-assess how this impacted on the propriety of the joint submission. Granted, it was still substantially short of what the sentencing judge thought was fit – 24 months. Nonetheless, the question that had to be confronted was whether the proposed sentence – 14 months' imprisonment – was so "unhinged" from the circumstances that it would lead a reasonable person to believe that the system was not functioning properly. In our view, it would not.

[28] In concluding, we note that the appellant has served just over four months of the sentence that was imposed. He has since taken steps to seek treatment for his opioid addiction. He has presented proof of a firm offer of full-time employment upon release.

Disposition

[29] Leave to appeal sentence is granted, the appeal is allowed, and the sentence is reduced to “time-served.” All other aspects of the sentence remain in force.

“Gary Trotter J.A.”
“Thorburn J.A.”
“L. Favreau J.A.”